

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel **Notice**

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N(35)000-149
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CR: N(42)000-8
July 21, 1997
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Subject: Private Delivery Services Cancellation Date: October 21, 1997

The purpose of this Notice is to alert field offices that the Service has designated four private delivery services ("designated PDSs") that taxpayers and Counsel attorneys can use in order to take advantage of the "timely mailing as timely filing/paying" rule of I.R.C. § 7502. The Notice discusses certain issues of particular importance to Chief Counsel attorneys resulting from the expansion of the section 7502 requirements for timely mailing as timely filing/paying.

Background

Before the recently enacted Taxpayer Bill of Rights 2 (TBOR2), only persons who sent returns, payments, and certain Tax Court documents via the United States Postal Service had the assurance that these documents and payments would be considered as timely filed if they were timely mailed and bore a United States postmark. The enactment of new section 7502(f) authorizes the Service to extend the timely filing/paying rule to designated PDSs. In Rev. Proc. 97-19, 1997-10 I.R.B. 55, the Service set forth the criteria to be used during an interim period to determine whether a PDS qualified as a designated PDS under section 7502(f). The revenue procedure also provided the application procedures for designation as a PDS during the interim period. Notice 97-26 (April 11, 1997) provides the first list of designated PDSs during the interim period.

First List of Designated PDSs and Types of Services

The following PDSs and specific types of delivery services are designated as qualifying for timely mailing/timely filing treatment under section 7502(f):

- Airborne Express (Airborne): Overnight Air Express, Next Afternoon Service, and Second Day Service.

Filing Instructions: Binder Part (35) Master Sets: NO X Field X
NO: Circulate Distribute X to: All Personnel Attorneys X In: FS, EBEO, INTL
Field: Circulate Distribute X to: All Personnel Attorneys X In: all divisions
Other National and Regional FOIA Reading Rooms
Electronic Filename: Mailing.wpd Original signed copy in: CC:F&M:PA

- DHL Worldwide Express (DHL): DHL "Same Day" Service and DHL USA Overnight.

- Federal Express (FedEx): FedEx Priority Overnight, FedEx Standard Overnight, and FedEx 2Day.

- United Parcel Service (UPS): UPS Next Day Air, UPS Next Day Air Saver, UPS 2nd Day Air, and UPS 2nd Day Air A.M.

Application to Mailings by Counsel

The new provisions apply to government mailings as well as to taxpayers mailings. Accordingly, Counsel attorneys may use these designated PDSs, as well as the U.S. Postal Service, in order to take advantage of the timely mailing/timely filing rule to mail answers, briefs, and other Tax Court documents.

Special Rules for Determining "Postmark" Date

Section 7502(f)(2)(C) requires a PDS to either (1) record electronically to its data base the date on which an item was given to the PDS for delivery or (2) mark on the cover of the item the date on which an item was given to the PDS for delivery. Pursuant to section 7502(f)(1), the date recorded or the date marked in accordance with section 7502(f)(2)(C) is treated as the postmark date for purposes of section 7502. All designated PDSs record electronically to a data base the date on which an item is received by the designated PDS. However, only Federal Express marks the date on the label of an item that is received from a customer (or allows the customer to mark the date).

Notice 97-26 provides that, for items delivered after their due dates by Airborne, DHL, and UPS, there is a presumption that the postmark date is the day that precedes the delivery day by an amount of time that equals the amount of time it would normally take for an item to be delivered under the terms of a specific type of delivery service used (e.g., two days before the actual delivery date for a two day delivery service). Taxpayers who wish to overcome this presumption will need to provide information that shows that the date recorded in the PDS's electronic data base is on or before the due date. Likewise, Counsel attorneys who utilize designated PDSs are advised to obtain a record of the electronic data base showing the "mailing" date, i.e., date on which the document was received by the PDS.

Regarding Federal Express, Notice 97-26 states that the date on the label affixed to the cover will be treated as the postmark date for purposes of section 7502. Notice 97-26 lists several exceptions to this general rule and, if the exception applies, the showing necessary to establish timely mailing via Federal

Express. These exceptions include situations in which the envelope is labeled by the customer, the date appearing on the label cannot be read, or the label is missing. For each of these exceptions, timely mailing can be proven if the sender provides documentation of the date electronically stored in Federal Express' data base. Accordingly, Counsel attorneys are also advised to obtain a record of the date recorded electronically to the PDS's data base when using Federal Express.

Motions to Dismiss for Lack of Jurisdiction

Notice 97-26 states that it is effective for documents and payments given to designated PDSs on or after April 11, 1997. The Notice further states that designation is not effective for documents and payments that are given by taxpayers to a designated PDS before April 11, 1997, even if such documents and payments are delivered by the designated PDS on or after April 11, 1997. Accordingly, the timely mailing/timely filing rule does not apply to petitions received after the due date if the petition was timely "mailed" via a designated PDS before April 11, 1997. If presented with this situation, Counsel attorneys should file motions to dismiss for lack of jurisdiction upon the ground that the petition is untimely, as under prior law.

Limits of Section 7502

Section 7502 applies when documents are required to be "filed" within a prescribed period or on or before a prescribed date. Conversely, the section may not apply to documents that merely are to be received by, but not filed with, the Tax Court. Tax Court Rules and orders sometimes direct that certain documents be "submitted," "received," or "furnished," as opposed to being "filed." For example, Tax Court Rule 143(f) requires that expert witness reports be "submitted" to the Tax Court and "furnished" to the opposing party; the report is not "filed" until marked and authenticated at trial. Similarly, the usual Standing Pretrial Order requires that a trial memorandum be "submitted" directly to the presiding judge by a date certain; the trial memorandum is not routinely filed as part of the record. As a precautionary measure, Counsel attorneys should not rely on section 7502 in transmitting these documents to the court. Instead, action should be taken to ensure that the document is actually received by the requisite due date.

Although the timely mailing/timely filing rules apply to government mailings of appropriate Tax Court documents, nothing herein is intended to supersede any regional or local directives concerning the timely submission of documents to the Tax Court or the use of the lowest cost option available. These provisions will be incorporated into the Chief Counsel Directives manual.

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Any questions with respect to the foregoing may be directed to Jordan Musen or Richard Goldman, at 202-622-7950.

/s/

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(Domestic)